No. 22,104-B

IN THE

United States Court of Appeals

For the Ninth Circuit

MIKE A. THOMAS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of California, Northern Division

APPELLANT'S OPENING BRIEF

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JURISDICTION

Appellant was indicted on August 5, 1966, by the Federal Grand Jury of the United States District Court for the Northern District of California, Cr. No. 14748, for the violation of 18 U.S.C. 371; 26 U.S.C. 5601 (a) (1) and 26 U.S.C. 5604 (a) (1) and was tried before the Honorable Thomas J. MacBride and a jury commencing February 28, 1967 (C.T. 2; R.T. 3).

Appellant was convicted on all three counts (R.T. 2720) and sentence was pronounced on May 12, 1967 (R.T. 2792). Appellant filed a timely notice of Appeal on May 19, 1967 (C.T. 63).

The District Court had jurisdiction under the provision of Title 18 U.S.C. 3231. This Court has jurisdiction to review this judgment under Title 28 U.S.C. 1291.

STATEMENT OF THE CASE

Appellant was indicted on August 5, 1966, for violation of 18 U.S.C. 371, i.e. conspiracy to violate 26 U.S.C. 5601 and 26 U.S.C. 5604, which are the United States Revenue laws pertaining to possession of an unregistered still and the possession, transportation, sale or transfer of distilled spirits without the required stamp.

Appellant was further indicted for violation of 26 U.S.C. 5601 (a) (1) i.e. possession of an unregistered still required to be registered under 26 U.S.C. 5179 (a) and violation of 26 U.S.C. 5205 (a) (2) (C.T. 2, 3, 4).

Trial commenced before the Honorable Thomas J. MacBride sitting with a jury on February 28, 1967 (R.T. 3), and thereafter appellant was convicted on three counts on March 31, 1967 (R.T. 2720).

The indictment in this case covers the period of March 3, 1965, to June 4, 1966 (C.T. 2, 3, 4).

However, the testimony in the case relates back to September, 1962, at which time Thomas was first introduced to Jack Courtney by a Gerald Brown (R.T. 1835-1836) and at which time Jack Courtney was an

undercover agent for the Treasury Department, and posing as a gangster or member of the syndicate (R.T. 831; R.T. 936; R.T. 852-853).

Courtney agreed to buy alcohol from Thomas and Becker (R.T. 861) and Thomas and Becker proceeded to build a still in Sacramento to supply Courtney with alcohol. The still was raided in October, 1962, and the appellant was arrested and after a plea of guilty was sentenced to jail and placed on probation (R.T. 858; R.T. 2283 to 2288; R.T. 845-846; R.T. 1245-1246; R.T. 937; R.T. 964; R.T. 870-871).

While the 1962 case was pending and while Becker was out on bail, Courtney contacted Becker by telephone in order to determine whether Becker and Thomas had discovered Courtney's true identity (R.T. 842; 883; 948; 949; 951; R.T. 673; 674; 675; R.T. 861, 862).

During Courtney's 1962 association with Becker and Thomas, in order to play the part of a gangster, Courtney showed Becker and Thomas strip stamps; displayed labels in the back of his car; and told Becker and Thomas he had a bottling plant as part of the syndicate operation (R.T. 669; 671; 831; 850; 851; 852; 853).

It appears that in 1962, the only spirits ever furnished to Courtney was eight gallons (R.T. 941-942).

Courtney testified that in the year of 1963, he had no contact whatsoever with Thomas (R.T. 946, 947, 948, 949) but that in December, 1963, he did call Becker on the phone in response to a letter written by

Becker; that he had previously called Becker in December 1962, while Becker was out on bail for the first offense to determine if Becker knew Courtney was a Federal Agent (R.T. 946, 947, 948, 949, 950, 951, 952, 953; R.T. 842, 846, 847; R.T. 671, 672, 673).

Since the 1962 arrest of Thomas, Courtney had no contact with him until 1964. It appears Becker wrote a letter to Courtney in December, 1963, and Courtney thereupon phoned Becker in reply. On January 28, 1964, Courtney met Becker at Thompson Motors, where a meeting was arranged at the Hyatt House in San Jose. On February 8, 1964, Courtney saw Thomas for the first time since 1962 (R.T. 674, 675, 676, 693, 694; R.T. 2114).

Between February 8, 1964, and June 4, 1966, the testimony of Courtney on direct examination shows the following contacts between himself and the respective defendants:

December 16, 1963	Letter	Becker to Courtney	R.T. 67
December 24, 1963	Phone call	Courtney to Becker	R.T. 67
January 28, 1964	Phone call	Courtney to Becker	R.T. 69
February 8, 1964	Hyatt House	Courtney, Becker, Thomas	R.T. 69
March ....., 1964	Phone call	Courtney to Becker	R.T. 69
May 27, 1964	Hilton	Courtney, Becker, Thomas	R.T. 69
September 10, 1964	Letter	Becker to Courtney	R.T. 69
October 6, 1964	Letter	Becker to Courtney	R.T. 70
October 6, 1964	Phone call	Courtney to Becker	R.T. 70
October 19, 1964	Phone call	Courtney to Becker	R.T. 70
October 22, 1964	Phone call	Courtney to Becker	R.T. 70
October 22, 1964	Hilltop	Courtney and Becker	R.T. 70
October 22, 1964	Mac Hotel	Courtney, Becker, Thomas	R.T. 70

cember 7, 1964	Letter	Becker to Courtney	R.T. 708
cember 15, 1964	Phone call	Courtney to Becker	R.T. 713
nuary 6, 1965	Phone call	Courtney to Becker	R.T. 714
nuary 11, 1965	Phone call	Courtney to Becker	R.T. 715
nuary 27, 1965	Letter	Becker to Courtney	R.T. 716-720
bruary 23, 1965	Phone call	Courtney to Becker	R.T. 720
rch 3, 1965	Santa Rosa	Courtney, Becker, Thomas	R.T. 721
rch 18, 1965	Phone call	Courtney to Becker	R.T. 724
rch 24, 1965	Phone call	Courtney to Becker	R.T. 725
rch 30, 1965	Sparks	Courtney, Becker, Thomas	R.T. 725
ril 8, 1965	Jack Tar	Courtney, Becker, Thomas, Jones	R.T. 729
ril 19, 1965	Phone call	Courtney to Becker	R.T. 731
ril 19, 1965	Phone call	Thomas to Courtney	R.T. 731-732
y 20, 1965	Letter	Becker to Courtney	R.T. 734
ıe 13, 1965	Phone call	Courtney to Becker	R.T. 752
y 28, 1965	El Rancho	Courtney, Becker, Thomas	R.T. 753-754
ober 12, 1965	Letter	Becker to Courtney	R.T. 756
ober 14, 1965	Phone call	Courtney to Becker	R.T. 759
uary 18, 1966	Phone call	Courtney to Becker	R.T. 763
ruary 15, 1966	Phone call	Courtney to Becker	R.T. 763
rch 8, 1966	Del Webb	Courtney, Becker, Greene	R.T. 764, 765, 766
ril 1, 1966	Letter	Courtney to Becker	R.T. 792, 793, 796
ril 11, 1966	Letter	Becker to Courtney	R.T. 797
ril 18, 1966	Phone call	Courtney to Becker	R.T. 798
y 28, 1966	Telegram	Becker to Courtney	R.T. 799-801
ıe 1, 1966	Phone call	Courtney to Becker	R.T. 801
ıe 2, 1966	Phone call	Courtney to Becker	R.T. 802
ıe 2, 1966	Phone call	Courtney to Becker	R.T. 803
ıe 4, 1966	Meeting at Thompson Motors	Courtney and Becker	R.T. 804

In addition to the above contacts related by Courtney on direct examination, further contacts between the government agents and Becker and Thomas are shown in Exhibit 1 (R.T. 288), Exhibit 2 (R.T. 303), Exhibit 3 (R.T. 470), Exhibit 4 (R.T. 470), Exhibit 7 (R.T. 909), Exhibit 8 (R.T. 922), Exhibit 9 (R.T. 923) and also (R.T. 832-839).

The first meeting since 1962, between Courtney and Thomas occurred at the Hyatt House in San Jose on February 8, 1964 (R.T. 966; R.T. 969), at which time Courtney was still posing as a big time gangster (R.T. 852-853; R.T. 883). At this meeting the defendants stated they had no still and Courtney offered to buy all they would sell him and set up an informal partnership (R.T. 884 to 887).

The second meeting between Courtney and Thomas occurred on May 27, 1964, at the Hilton Inn in San Bruno (R.T. 697) at which time Courtney complained that "The boss is on my back. I have to have something to tell him" (R.T. 893-894). Courtney further alluded to the "bottling plant" owned by the syndicate (R.T. 897).

The third time Courtney and Thomas met was on October 22, 1964, at the Mac Hotel in Richmond (R.T. 706) at which time Thomas delivered 10 gallons of spirits to Courtney and at which time Courtney showed great disappointment in the small amount (R.T. 899, 900).

It appears from the testimony of Curtice, called by the government that he had made the ten gallons in late 1964 (R.T. 57; R.T. 67) at Ceres, California,

and 35 gallons in November or December 1964, in Cloverdale (R.T. 58) and produced 60 gallons in Ceres, California, in May and June of 1966. That he produced no spirits in the year 1965 (R.T. 67, 68; R.T. 89, 90; R.T. 92).

Curtice further testified that during this period Thomas displayed concern over the "syndicate" and possible harm (R.T. 103-104).

The third meeting between Courtney and Thomas occurred on March 3, 1965, in Santa Rosa, California at the Los Robles Inn where Thomas delivered 35 gallons of spirits to Courtney (R.T. 721-722). At this meeting, a still site in Nevada was discussed (R.T. 724) and a meeting arranged in Sparks, Nevada (R.T. 724-725).

The fourth meeting between Thomas and Courtney occurred March 30, 1965, at Sparks, Nevada, at the Nugget Motel (R.T. 726-727) at which time Courtney agreed to furnish Thomas and Becker with a still site (R.T. 727-728).

The fifth meeting between Courtney and Thomas took place on April 8, 1965, at the Jack Tar Hotel in San Francisco. At this meeting Becker and Thomas introduced Billy Jones to Courtney stating he was a still operator (R.T. 729-730).

In connection with Billy Jones who went to the meeting of April 8, 1965, at the Jack Tar and claimed to be a still operator, Jones testified that Thomas asked him for a favor, that is, to pass himself off as a "still monkey" in order to placate the "syndicate" (R.T. 1657-1664).

A phone contact between Courtney and Thomas occurred on April 19, 1965, where Thomas phoned Courtney in Reno at Courtney's request and Thomas stated he did not care to set up the still at the Nevada site (R.T. 731-732).

The final meeting between Courtney and Thomas occurred on July 28, 1965, at the El Rancho in Sacramento (R.T. 753-754).

The testimony of the Government's witnesses is undisputed that in the years of 1964, 1965 and 1966, a total of 105 gallons of spirits was manufactured and all 105 gallons were sold to the Government agents and none sold to any other persons. R.T. 1006-1008 (Courtney), R.T. 57-59 (Curtice), R.T. 180 (Caughron), R.T. 552-553 (Bertolani).

The testimony of the Government witness regarding the undercover operation in the investigation of Thomas and Becker shows:

1. That Courtney posed as a gangster, a member of the syndicate (R.T. 179, R.T. 831; R.T. 853; 912; 914; 925; 934).

2. That Courtney offered a still site to the defendants in Nevada (R.T. 907; 910; 911).

3. Courtney offered to furnish a still monkey (R.T. 906).

4. Courtney arranges to furnish 2000 pounds of sugar to Thomas (R.T. 919; R.T. 517-518; R.T. 115; R.T. 249-254; R.T. 908).

5. Courtney offers to arrange to bribe Becker's probation officer (R.T. 884).

6. Courtney offered to try to get plastic containers for the defendants (R.T. 933).

7. Courtney knew that defendants were not in illegal operations in December, 1963 (R.T. 960-961), and knew they were on probation (R.T. 964).

8. Courtney offered to furnish a still to the defendants (R.T. 1039, 1040, 1043).

During the course of cross-examination of agent Caughron, by the attorney for Thomas, Caughron was asked if he had found anything to indicate that Thomas was a member of a gang. Caughron replied that he thought of Greene, Thomas and Becker as being a gang. In pursuing this answer for clarification Caughron stated Greene was in possession of $50,000.00 worth of stolen U. S. Bonds (R.T. 183-185).

Further testimony showed that Caughron had absolutely no evidence that Thomas had ever associated with Greene (R.T. 187-188; R.T. 190) nor was Thomas present with Greene at the meeting at the Del Webb Towne House on March 8, 1966 (R.T. 764-765) nor was there evidence that Thomas had any knowledge of the Bonds (R.T. 785-786).

At this point, attorney for Greene moved for a mistrial which was joined in by Thomas and Becker; the Court denied all motions (R.T. 192-234).

A motion to strike the testimony relating to stolen bonds was then made by Thomas (R.T. 235-236).

The motion to strike was granted as to Greene and Becker (R.T. 239) but overruled as to Thomas (R.T. 239-240) although there was no testimony to connect Thomas with the Bonds (R.T. 241; R.T. 785-786).

During the examination of Courtney, a letter from Becker to Courtney was produced (Government's No. I) which referred again to the Government Bonds and that part referring to the Bonds was deleted by the Court (R.T. 756, 757, 758).

Courtney testified that on March 8, 1966, he met Becker and Greene at the Del Webb Towne House in San Francisco (R.T. 764, 765).

On Voir Dire examination out of the presence of the jury, the Government Bonds were again brought up by Courtney (R.T. 766-770). Over objection of counsel (R.T. 770-789) the Court allowed the testimony of the Bonds before the jury (R.T. 791).

Government Exhibit F was produced, being a letter from Becker to Courtney which letter referred to "butts" meaning illicit cigarettes which reference was deleted by the Court (R.T. 709-712).

Government Exhibit G was produced being a letter from Becker to Courtney and referring again to "butts" meaning illicit cigarettes which reference was deleted (R.T. 716-719).

Government Exhibit J was produced being another letter from Becker to Courtney but referring to "yellow dust" meaning gold to be smuggled which reference was deleted (R.T. 793-797).

On rebuttal, the assistant United States Attorney produced Government Exhibit F previously admitted with references to the Bonds deleted and now sought to have the deletions removed (R.T. 2136).

After arguments of counsel (R.T. 2137-2141) the Court ruled that all deletions from Government Exhibits F, G, I and J would be removed and the entire letters read to the jury (R.T. 2142-2146).

As a result of this ruling by the Court, the assistant United States Attorney was allowed to read into the record before the jury the entire letters without the deletions to wit: Government No. I (R.T. 2147-2149); No. F (R.T. 2166-2167); No. G (R.T. 2169-2170) and No. J (R.T. 2174).

In addition thereto, there was admitted into evidence Government Exhibit No. X which was a letter from Becker to Courtney and which referred to the allegedly stolen Bonds (R.T. 2159-2160).

The exhibits having been admitted over objection of counsel (R.T. 2136-2146), the assistant United States Attorney argued the other allegedly illegal activities i.e. stolen Bonds, illicit cigarettes, illegal gold to the jury (R.T. 2629-2632).

Thereafter, the Court in its instruction wholly failed to instruct on the matter of other crimes and misconduct so as to limit the application of such evidence regarding "stolen bonds" and "illegal cigarettes" as to Thomas and also failed to limit the application of other crimes and misconduct regarding "illegal gold" in relationship to the crimes charged in the indictment.

At R.T. 2983 the Court refers to the "existing intent or readiness or the willingness to break the law" without limiting the instruction to the charge in the indictment.

At R.T. 2685 the Court instructed:

> "In determining whether a defendant is willing to commit a crime charged against him in the indictment, you may consider all of the evidence in this case including prior convictions of crimes of a similar nature, prior misconduct of a defendant of similar nature, his conduct in dealing with the Government agents, including his relationship with those agents *in any and all matters and you may consider any other evidence which would indicate his state of mind and bear on the question of his existing intent, readiness or willingness to commit a crime.*"

Under these instructions defendant Thomas was, in effect, associated with the stolen Bonds and illegal cigarettes without any evidence to support such an association (R.T. 188, 190; R.T. 785, 786; R.T. 2215) and there is no evidence that there ever existed any stolen cigarettes (R.T. 2234) and that the "stolen bonds" were in fact, non-negotiable (R.T. 2241).

Further, the admission into evidence of illegal gold is not in fact supported by any evidence that it is illegal or that any crime or misconduct was involved (R.T. 2216-2218; R.T. 2220-2222).

I

THE FACTS ESTABLISH ENTRAPMENT AS A MATTER OF LAW AND IT WAS ERROR TO DENY THOMAS' MOTION FOR JUDGMENT OF ACQUITTAL

Every overt act alleged in the indictment is the result of the creative activities of the Government agents.

The evidence shows that the first contact made in relation to the present indictment was Becker who wrote a letter to Courtney on December 16, 1963 (R.T. 674), which letter no way implicates Thomas nor can it be said that any conspiracy existed at this point. The next contact was a phone call from Courtney to Becker on December 24, 1963, which was recorded by Courtney (R.T. 676). The phone call does not in any way establish a conspiracy (R.T. 693).

On January 28, 1964, Courtney called Becker to arrange a meeting at the Hyatt House in San Jose on February 8, 1964 (R.T. 694).

Due to the complete lack of any evidence of a conspiracy at this point, no letter or statement by Becker could be imputed to Thomas.

The first evidence implicating Thomas is a meeting at the Hyatt House on February 8, 1964, attended by Becker, Thomas and Courtney. This is the first evidence of any conspiracy or agreement of any kind and the co-conspirator was Courtney, who was an accomplice (R.T. 695), a feigned gangster who aided, abetted, induced and persuaded Thomas and Becker to deliver alcohol.

In spite of the pressures applied by Courtney, it was not until October 22, 1964, that 10 gallons of alcohol was delivered (R.T. 706).

Again, it was not until March 3, 1965, that 35 gallons were delivered in Santa Rosa (R.T. 721).

And finally, it was not until June 4, 1966, that 60 gallons were delivered to the agents (R.T. 804).

It stands undenied that the total alcohol made was 105 gallons and that all 105 gallons were sold to the Government agents.

On the 24th of April, 1966, the U. S. agents delivered 2000 pounds of sugar to Thomas so that the 60 gallons could be made (R.T. 58, 59; R.T. 93; R.T. 108, 109; R.T. 114 to 124).

From the first meeting between Thomas and Courtney on February 8, 1964, at the Hyatt House, it was not until the latter part of 1964, that Thomas made a small still (R.T. 56) and delivered 10 gallons (R.T. 706) after constant pressure by Courtney (R.T. 676, 694, 696, 697, 703, 705) on Becker, then on Becker and Thomas.

The facts are undisputed that it took Thomas from February 8, 1964, until June 4, 1966, a matter of 2 years, 3 months, to furnish 105 gallons of alcohol under pressure from a "syndicate" gangster.

There is absolutely no evidence that Thomas was engaged in any criminal activity between December 16, 1963, and late Fall 1964, when he finally made a still and produced 10 gallons of alcohol delivered to

Courtney on October 22, 1964, at the Mac Hotel (R.T. 706; R.T. 947).

In *Hamilton v. U. S.,* 221 F. 2d 611 at 614 (1955) 5th C.C.A. the Court stated:

> "When it is suspected that a crime is being committed, for instance, in the sale of narcotics, and the question is as to who is the guilty party traps may be laid by affording the suspect an opportunity to sell the same in order to catch the guilty person. A suspected criminal may be offered an opportunity to transgress in such manner as is usual therein, but extraordinary temptations or inducements may not be employed by officers of the government."

The Court held in *United States v. Wray* (1925 D.C.) 8 F. 2d 429, as follows:

> "Much confusion of thought has been occasioned by the use of the word 'entrapment' in this connection. Whenever an officer of the law, by any plan or contrivance, or opportunity presented, causes a person to commit a crime in which he is detected, the officer entraps the criminal. It may also be said that the particular offense would not have been committed except for the act of the officer. Nevertheless, it is well settled, when it is suspected that a crime is being committed, and the question is as to who the guilty persons are, that traps may be laid and baited as by decoy letters, by opportunity to sell whiskey or morphine, in order to catch the guilty person. On the other hand, officers of the United States may not induce persons who would not otherwise have committed crime, to violate the

laws, and then prosecute for it. A sound public policy and a decent fairness forbid it. It is not, therefore, properly speaking, the entrapment of a criminal that the law frowns down, but the seduction by its officers to commit crime. A suspected person may be tested by being offered opportunity to transgress in such manner as is usual therein, but may not be put under extraordinary temptation or inducement. Thus, a morphine peddler usually deals with addicts. An officer, in testing a supposed peddler, may properly pretend to be an addict, with their common discomforts and craving for the drug, thus giving color to the ruse, and he may offer a liberal price for the drug, and manifest considerable persistence, for these things are common in such dealings. But he could not pretend to be in excruciating pain, or to have a wife or friend in extremity of suffering, to appeal thus to humanity, or offer any fabulous price for the drug. So, one desiring to test a supposed liquor seller might represent himself to be such a person as could be trusted in such a transaction, and do and say such things as would not be unusual in such dealings, but he could not pretend sickness or put extraordinary pressure upon his victim to get him to break the law, and, of course, could not organize a liquor plot and then prosecute for it. The question, I repeat, is not one of laying a trap, or of trickiness or deceit, but one of seduction or improper inducement to commit crime. The former is permissible and often necessary to enforce the law. The latter is not."

In *Whiting v. U. S.*, 321 F. 2d 72 (1st C.C.A. 1963) the Court stated:

"We suggest, what we take to be in accord with Accardi v. United States, 5 Cir., 1958, 257 F. 2d 168, Cert. den. 358 U. S. 883, 79 S. Ct. 124, 3 L. Ed. 2d 112, that once government inducement has been shown, there are two issues. The government should establish that it engaged in no conduct that was shocking or offensive per se, and that the defendant was not, in fact, corrupted by the inducement."

In *Sherman v. U. S.,* 1958, 356 U.S. 369, 78 S. Ct. 819, 2 L. Ed. 2d 848, the Court stated:

"However, a different question is presented when the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute", citing:

Sorrells v. U. S., 287 U. S. 435, 53 S. Ct. 210.

In *Lopez v. U. S.,* 373 U.S. 427, 83 S. Ct. 1381, 10 L. Ed. 2d 462, the Court stated:

"The conduct with which the defense of entrapment is concerned is the *manufacturing* of crime by law enforcement officials and their agents. Such conduct, of course, is far different from the permissible and prevention of crime. Thus before the issue of entrapment can fairly be said to have been presented in a criminal prosecution, there must have been at least some showing of the kind of conduct by government agents which may well have induced the accused to commit the crime charged."

In *Hansford v. U. S.,* 303 F. 2d 219 (1962, D.C. C.A.):

> "But readiness and disposition is not established by evidence that the person is not 'innocent' in that he has a criminal record. Innocent in the context of entrapment means that the defendant would not have perpetrated the crime for which he is presently charged but for the enticement of the police official."

In *Banks v. U. S.,* 249 F. 2d 672 (1957, Ninth C.C.A.):

> "As the Supreme Court has stated of the defense against such use of the Court's process by entrapment to procure a conviction:
>
> "The defense is available, *not in the view that the accused though guilty may go free,* but that the government *cannot be permitted to contend* that he is guilty of a crime where the government officials are the instigators of his conduct."

It stands undenied by the testimony of the Government's witnesses that Courtney posed as a gangster and member of the syndicate; that he offered to furnish a still site; that he offered to furnish a still monkey; that he offered to furnish containers; that he furnished 2000 pounds of sugar; that he complained he was being "pushed" from his big boss; that he could fix a judge in Mexico; that he could arrange an abortion; that he could bribe Becker's probation officer.

This general course of conduct goes far beyond being a willing buyer or merely creating an opportunity for a defendant to break the law, and Thomas's Motion for Judgment of Acquittal should have been granted (R.T. 1104-1171).

II

IT WAS PREJUDICIAL ERROR TO ALLOW TESTIMONY OF OTHER MISCONDUCT AGAINST THOMAS

When Thomas's attorney was attempting to explore the alleged conspiracy between Thomas and Greene, Agent Caughron stated that Greene had $50,000.00 in stolen Bonds (R.T. 183-185).

Further testimony showed that Thomas was in no way connected with or had knowledge of these "stolen" Bonds (R.T. 187, 188, 190; R.T. 785, 786; R.T. 764, 765).

The Court overruled a motion to strike by Thomas (R.T. 239, 240) and allowed the testimony to stand.

The Court again allowed testimony of the Bonds before the jury by allowing a reading of Government Exhibit I (R.T. 2147-2149).

The Court further allowed a reading of Government Exhibit F which referred to stolen cigarettes; Government Exhibit G referring to stolen cigarettes; Government Exhibit J referring to illegal gold (R.T. 2166-2174); and there was further admitted Government Exhibit X again referring to the Bonds (R.T. 2159-2160).

In *Devore v. U.S.*, 368 F. 2d 396 (9th C.C.A.) the Court stated:

> "Evidence which discloses the commission of another offense should be excluded, *even though relevant,* if the value of the evidence is limited and the danger of prejudice from its use is great."

See also:

Powell v. U. S., 347 F. 2d 156 (9th C.C.A.).

In *De Jong v. U. S.,* 381 F. 2d 725 (9th C.C.A.) the Court stated:

> "Evidence of prior acts of misconduct is not admissible unless in some way relevant to the crime charged, and where entrapment is in issue evidence of prior crimes is not relevant unless it tends to prove that defendant was engaged in illegal operations in some way similar to those charged in the indictment."

See also:

Enrique v. U. S., 314 F. 2d 703 at 713-717.

In *Lutwak v. U. S.,* 73 S. Ct. 481 the Court stated:

> "Declarations stand on a different footing. Declarations of one conspirator may be used against the other conspirator not present on the theory that the declarant is the agent of the other, and the admissions of one are admissible against both under a standard exception to the hearsay rule applicable to the statements of a party (citing cases) but such declaration can be used against the co-conspirator only when made in the furtherance of the conspiracy. * * *
>
> Relevant declarations or admissions of a conspirator made in the absence of the co-conspirator, and not in furtherance of the conspiracy, may be admissible in a trial for conspiracy as against the *declarant's* participation therein. The Court must be careful at the time of the admission and by its instructions to make it clear that the evidence is limited as against the declarant only."

In *Erwing v. U. S.,* 296 F. 2d 320 (1961) (9th C.C.A.) the Court stated:

> "The general rule prevailing in this circuit is that when a defendant is on trial for a specific offense evidence of a distinct offense unconnected with that charged in the indictment is inadmissible."

In addition to the fact that the "other crimes and misconduct" went before the jury when the evidence showed that in fact there were no stolen cigarettes or illegal gold (R.T. 2234; R.T. 2216-2218; R.T. 2220-2222).

This testimony of the Government witness was based solely on suspicion, surmise and guesswork and had no basis in fact, and the testimony about the Bonds in no way was connected to Thomas nor made a part of the alleged conspiracy since Greene was acquitted on the conspiracy charge, the Government's theory of connecting up the Bonds to the conspiracy being extremely remote. At best, it merely showed the possible groundwork for an independent operation in the future and amounted to mere speculation.

After having presented before the jury the alleged misconduct consisting of testimony about illegal bonds, gold and cigarettes, the Assistant U. S. Attorney argued these "other crimes and misconduct" before the jury as bearing on the guilt of the defendants (R.T. 2629-2632; R.T. 2648-2649; R.T. 2653), and stated that a liquor violator was like a narcotic peddler (R.T. 2625; R.T. 2644).

Thereafter, the Court, in its instructions to the jury at R.T. 2683 instructed the jury about the existing intent, or readiness or the willingness to break the law wholly fails to limit the instruction to the crimes charged in the indictment but uses such general language so that the instruction would include the evidence of illegal bonds, gold and cigarettes.

Again at R.T. 2685 the Court instructed that the jury could consider "prior misconduct of a defendant of a similar nature, including his relationship with those agents in any and all matters, *and you may consider any other evidence* which would indicate his state of mind and bear on the question of his existing intent, readiness or willingness to commit *a crime.*

Again the Court allowed the jury to consider the testimony regarding the illegal bonds, gold and cigarettes which is in no way part of the crime charged in the indictment.

At R.T. 2687, the instruction again refers at line 7 to "a crime" and at line 12 refers to "other crimes" without ruling out, against Thomas, the evidence of illegal bonds and cigarettes which in no way was connected to Thomas (R.T. 241; R.T. 785-789; R.T. 188, 190; R.T. 2215).

This admission into evidence of other crimes is clearly prejudicial under the rule of the *De Jong* case and especially prejudicial since it was not part of the alleged conspiracy and yet imputed to Thomas.

III

THE EVIDENCE ESTABLISHES AS A MATTER OF LAW THE DEFENSE OF CONSENT BY THE GOVERNMENT TO THE ALLEGED CRIMES AND THE AGENCY OF THE DEFENDANT

The first meeting that could be considered the formation of a conspiracy was on February 8, 1964, at the Hyatt House where Becker, Thomas and Courtney met. At this time, the only inference that can be drawn from the evidence is that no still was in existence. No still was constructed until the latter part of 1964 (R.T. 56).

Further, the evidence is undisputed that a total of 105 gallons of alcohol was made and all 105 gallons were sold to the government. There is no evidence of any "independent" crime other than the ones committed at the inducement of the government agent Courtney.

In *Henderson v. U. S.,* 261 F. 2d 909 (1959) (5th C.C.A.) the defendant agreed to purchase drugs for an undercover agent who stated he and his wife were ill and needed the drugs. The defendant complied and purchased heroin for the government undercover agent. All the heroin was purchased by the government.

The Court held that the defendant acted not for herself but as the sub-agent of the government and, because acting for the government the agent was not guilty of any offense and neither was the defendant.

See also:

Adams v. U. S., 220 F. 2d 297 (1955) (5th C.C.A.)

In *Woo Wai v. U. S.,* 223 F. Rep. 412 (1915) (9th C.C.A.) the Court cited an example in the case where a detective for a railroad company "conspired" with defendant to rob a train. The conspiracy originated with the detective who induced the defendant to participate.

The Court, in the example, held that since the railroad had assented to the robbery, there was no trespass and no larceny.

In *U. S. v. Campbell,* 235 F. Supp. 190 (1964) (D.C. E.D. New York) the defendant was prosecuted for engaging in the business of receiving wagers without paying the imposed tax.

The evidence disclosed that defendant had received a series of wagers from internal revenue agents at their solicitation.

The Court held:

> "The great difference is that the agents' activities must serve to throw light on independently existing criminality and must not themselves be the constitutive elements of all the offense that is made to appear. The test of criminality is not the embittered and disdainful standard of Mark Twain's The Man that Corrupted Hadleyburg, the ability to withstand calculated temptation by the government, but the more useful standard of actual engagement in the criminality at the solicitation of others than the government; where that exists, the evidence of agents' activities is useful, but useful only as it proves criminality beyond that which consists solely in the immediate reciprocals of the agents' acts."

Under Title 26, Sec. 5214, the U. S. Government may purchase alcohol without the tax thereon having been paid.

It is the appellant's contention that the only inference that can be drawn is that Courtney had authority to buy alcohol on which the tax was not paid and that, since all of the alcohol was sold to the government agent, and no independent crime was disclosed, it must follow that since Courtney was a feigned co-conspirator, the defendant Thomas was, in fact, a sub-agent of the government and the government consented to the acts now complained of.

IV

THE DEFENDANT THOMAS DID NOT INTELLIGENTLY WAIVE HIS PRIVILEGE UNDER THE FIFTH AMENDMENT AGAINST SELF-INCRIMINATION

Thomas was indicted August 5, 1966 (C.T. 2) and trial in the matter commenced February 28, 1967 (R.T. 1).

At the time of the indictment and trial, the cases uniformly held that the requirement to buy stamps and register under the Revenue Laws, Title 19 U.S.C. did not violate the Fifth Amendment in the matter of self-incrimination as far as wagering stamps, and registration, and firearm stamps, and registration were concerned.

See:

U. S. v. Costello, Marchetti, et al., 352 F. 2d 848 (1965) (2nd C.C.A.);

U. S. v. Grosso, 358 F. 2d 154 (1966) (3rd C.C.A.);

Haynes v. U. S., 372 F. 2d 651 (1967) (5th C.C.A.)

See also:

U.S.C.A. Article V (1961-1967 Supp.) p. 332, notes 105, 105a.

While the instant case has been on appeal, the Supreme Court decided the cases of *Marchetti v. U. S.,* 88 S.Ct. 697; *Grosso v. U. S.,* 88 S.Ct. 709; and *Haynes v. U. S.,* 88 S.Ct. 722.

Appellant prays this Honorable Court to take judicial notice of the statutes of the State of California regarding the regulation of Alcoholic Beverages and the penalties as contained in Business and Professions Code, Sections 23300, 23301, and Revenue and Taxation Code, Sections 32201, 32552, 32553, 32554, and 32555.

It is true that the defendant Thomas did not raise the constitutional question against self-incrimination at the trial, but this appeared at the time to be an idle gesture due to the state of the federal law at that time.

However, the fact remains that to require Thomas to register an illegal still and become licensed to sell illegal spirits would place him in criminal jeopardy with the State of California since there is nothing in the Revenue Laws relating to liquor and spirits that

makes such registration and purchase of stamps confidential.

Appellant is well aware of the rule that ordinarily one cannot raise a question on appeal that was not made an issue in the trial Court.

However, under Title 28, U.S.C., Section 1291, the appellate Court has the power and authority to consider for the first time, on appeal, an occurrence after the decision appealed from either under the concept of "plain error" or to prevent a miscarriage of justice.

In *Abbot v. Bralove,* 176 F. 2d 64 (1949) the Court held that the Court of Appeals has the power not only to correct error in a judgment under review but to make such disposition of a case as justice required, and in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered.

In *Kohatsu v. U.S.,* 351 F. 2d 898 (1965) C.A. Cal. the Court held that the defendant's claim that admission of evidence violated defendant's constitutional rights could be properly considered by the Court of Appeals despite lack of objection on constitutional grounds at the trial, particularly since a relevant United States Supreme Court decision followed defendant's conviction if defendant's rights were, in fact, violated.

Based upon the foregoing premises, appellant respectfully urges the Court to consider the constitu-

tional privilege of the appellant against self-incrimination under the Fifth Amendment.

CONCLUSION

It is respectfully submitted that the judgment of conviction should be reversed and the appellant discharged under Specifications of Errors I, III and IV or, in the alternative, that the matter be remanded for a new trial under Specifications of Errors I, II, III and IV.

Dated, Sacramento, California,
April 2, 1968.

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the Unites States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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